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No. 02-1631

IN THE
SUPREME COURT OF THE UNITED STATES

RAMON PORTALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities i

Argument in Reply: 1

1. Contested trial testimony concerning the odor emanating from the wrapped bundles neither reduced the petitioner's expectation of privacy nor diminished the seriousness of the Fourth Amendment violation 2

2. This case does not so clearly fit within the *Andreas* exception to the warrant requirement as to justify a denial of certiorari on that basis 3

Conclusion 5

TABLE OF AUTHORITIES

Cases:

Carroll v. United States, 267 U.S. 132 (1925) 2
Illinois v. Andreas, 463 U.S. 765 (1983) 1, 3, 4
United States v. Johns, 469 U.S. 478 (1985) 3
United States v. Longmire, 761 F.2d 411 (7th Cir. 1985) 2

Constitution, Statutes and Rules:

U.S. Const., amend. IV 1, 3
LAR 53(b) (7th Cir.) 1

ARGUMENT IN REPLY

Ramon Portales has petitioned this Court for a writ of certiorari to review the judgment and opinion of the Seventh Circuit. The court below upheld the denial of petitioner's pretrial motion to suppress evidence on an indefensible basis -- that probable cause to believe an opaque package contains drugs is enough to justify a warrantless search of that package, simply because the package itself was seized in plain view. The respondent does not deny that this Court's cases, as consistently announced over the past 20 years and more, hold the opposite. Instead, the Brief in Opposition argues that certiorari should be denied because the "petitioner had no expectation of privacy in the bundles," which, according to a federal agent who testified at trial, "smelled ... of marijuana." Br.Opp. 7. The respondent also argues that certiorari should be denied, because in its view "[t]he judgment below is also correct under *Illinois v. Andreas*, 463 U.S. 765 (1983)." Br.Opp. 7. Finally, the respondent argues that the Seventh Circuit's unpublished decision creates no circuit conflict, even though it is at odds with the published opinions of other courts of appeals, because it "lacks precedential value under Seventh Circuit Rule 53(b)(2)(iv)." Br.Opp. 9.

While an nonprecedential opinion may not create a formal circuit conflict, this Court should nevertheless grant certiorari to correct a lower court decision which flouts this Court's established Fourth Amendment jurisprudence. The respondent's arguments do not undermine this reason to grant the writ.

1. Contested trial testimony concerning the odor emanating from the wrapped bundles neither reduced the petitioner's expectation of privacy nor diminished the seriousness of the Fourth Amendment violation.

There was testimony at trial that the crates containing the wrapped bundles smelled of marijuana, CA7 App. 231. Because no such testimony was elicited at the suppression hearing, however, the district court "assum[ed] that [the agents] didn't smell it." Pet. App. B6. While an appellate court may consider testimony introduced at trial in determining the validity of a search, *Carroll v. United States*, 267 U.S. 132, 162 (1925), the court of appeals in this case did not affirm the denial of the suppression motion based on the "plain odor" trial testimony. Under Seventh Circuit law, the court of appeals was not required to consider such testimony where, as here, the testimony was contested at trial,[1] the district court did not credit the testimony, and the jury's verdict is not dependent on the jury's crediting the testimony. *United States v. Longmire*, 761 F.2d 411, 418 (7th Cir. 1985).

Because there is no evidence that any lower court credited the odor testimony elicited at trial, the respondent is not entitled to treat that contested "fact" as established of purposes of appeal. Accordingly, the respondent's argument does not demonstrate that the petitioner lacked a reasonable expectation of privacy sufficient to

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[1] See CA7 App. 226, 233, 237 (challenging credibility of odor testimony).

justify a warrantless search of the opaque packages.[2] This Court should grant the writ to correct the court of appeals' disregard of established Fourth Amendment jurisprudence.

2. This case does not so clearly fit within the *Andreas* exception to the warrant requirement as to justify a denial of certiorari on that basis.

The respondent also argues that the writ should not be granted, because "[t]he judgment below is also correct under *Illinois v. Andreas*, 463 U.S. 765 (1983)." Br.Opp. 7. This Court held in *Andreas* that a defendant has no further privacy interest in a closed container once government agents have already lawfully opened it and determined that it contains contraband. *Andreas* does not apply under the facts of this case, because the record does not establish that the "containers" the agents searched (*i.e.*, the wrapped bundles found in crates in the warehouse) were the same "containers" that had been "previously opened under lawful authority" at the weigh station in Missouri.

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[2] In any event, even if the facts of this case established, as the respondent argues, that the odor of the wrapped bundles betrayed their contents, Br.Opp. 7, that would be a reason to *grant* the writ -- not to deny it. This Court has never established a "plain odor" exception to the warrant requirement. In *United States v. Johns*, 469 U.S. 478, 486 (1985), the Court expressly declined to decide the question. Should the Court believe that the facts and record of this case are sufficient to support such an argument, it should grant the writ and decide this important issue.

In this case, the government advanced an *Andreas* argument only in a footnote to its post-hearing brief in the district court. The district court did not address that theory, much less rest its decision upon it. The government then relied principally upon *Andreas* in the court of appeals, but once again the court did not rule on that basis. The facts of this case reveal why both courts below wisely steered clear of the *Andreas* theory.

Only one of the paper-wrapped bundles had been lawfully opened by law-enforcement officials when the truck was first stopped. Thus, no more than one of those bundles *could* have come within the *Andreas* exception. The district court never found that *that* bundle was actually searched later at the warehouse. All it found was that the previously searched marijuana had been unloaded from the truck and taken to the warehouse. Pet. App. B5. Because no government agent marked the previously-opened bundle for identification prior to the truck's pulling up to the loading dock at Mr. Portales's warehouse, there was no way to tell whether the agents actually opened the bundle that had previously been searched. Under *Andreas*, the fact that the agents lawfully searched *one* of the bundles removed the reasonableness of any expectation of privacy the petitioner had with respect to *that* bundle -- but not to the remainder of the packages.

While the agents may have had probable cause to believe that the *other* bundles *also* contained marijuana, which therefore gave them the authority to *seize* them, this Court's cases indisputably establish that probable cause alone did not allow them to search the bundles without a warrant. For this reason, the lower courts could not have approved the search under *Andreas*.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the petition itself, this Court should grant the petition of Ramon Portales for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

Respectfully submitted,

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